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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 190

JAMES TURNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF AMICUS CURIAE ON BEHALF OF CLEVELAND BURGESS URGING REVERSAL

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INTEREST OF AMICUS CURIAE

Cleveland Burgess was convicted in November 1967 in the United States District Court for the District of Columbia on six counts for narcotics violations arising from two alleged sales of heroin. With respect to each sale, a jury

*Pursuant to Rule 42, paragraph 2, there have been lodged with the Clerk the written consents of counsel for the petitioner and of the Solicitor General of the United States to the filing of this Brief Amicus Curiae.

found Burgess guilty of violating the three statutory provivions involved in this case and in No. 189, *James Minor v. United States*–21 U.S.C. § 174 (facilitating the concealment of an unlawfully imported narcotic drug); 26 U.S.C. § 4704a (sale of a narcotic drug not in or from the original stamped package); and 26 U.S.C. § 4705a (transfer of a narcotic drug without a written order on an official order form). His petition for leave to appeal in forma pauperis having been granted, Burgess' case (D.C. Cir. No. 21,745) is one of several narcotic convictions[1] now under review for possible constitutional defects by the United States Court of Appeals for the District of Columbia Circuit.

In the pending review in the Court of Appeals, Burgess has filed a brief which raises constitutional issues including, *inter alia*, the issues now posed to this Court in the instant case and in No. 189. In the light of this identity of issues, the United States Attorney for the District of Columbia moved on August 7, 1969 for extension of his time for filing his responsive brief in various cases there on review until the Solicitor General has filed his brief in the Supreme Court. "In this way," the Government informed the Court of Appeals, "appellee will be able to present the same arguments both to the Supreme Court and to this court [the Court of Appeals]."

Since the issues in this Court replicate the issues in Burgess' case, it is unlikely that the Court of Appeals will make any determination independently and in advance of this Court's disposition of the instant cases. It is therefore of utmost importance to Burgess that this Court consider argument on every subsidiary question fairly comprised within the questions here presented for review. Moreover, since there are other related issues possibly not within the issues explicitly raised in the briefs of petitioners[2] it is also

[1]The other pending cases are *Bowman v. United States*, D.C. Cir. No. 22,546, *Collins v. United States*, D.C. Cir. No. 22,770, and *Mills v. United States*, D.C. Cir. No. 23,020.

[2]These arguments involve the consistency of statutory presumptions with the defendant's right to due process of law (Arg. IA) and

of utmost importance that the decisions of this Court be informed with respect to these considerations. To these ends, this brief amicus curiae is respectfully submitted.

ARGUMENT

SUMMARY OF ARGUMENT

The Constitution is violated by a conviction based on the statutory presumption in 21 U.S.C. § 174, providing that–

> "Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Specifically, the Constitution is violated in three respects, as follows.

First, the presumption violates due process of law under the Fifth Amendment insofar as it authorizes a jury to convict upon the basis of two inferences from mere possession of a narcotic drug that are rationally impermissible, namely that the drug had been imported unlawfully to the United States and that the defendant knew of such unlawful importation. (Arg. IA)

Second, the presumption violates the Fifth Amendment's protection against self-incrimination at trial, once possession is shown, by making conviction depend upon whether the defendant testifies to "explain . . . the possession to the satisfaction of the jury", thereby providing evidence which could serve as the basis for other Federal or state criminal prosecutions. (Arg. IB)

Third, in serving as the basis for jury instructions that authorize conviction without proof of key elements of the offense (unlawful importation and knowledge thereof) the

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trial by jury (Arg. IC) and the role of 26 U.S.C. § 4704a as a key element in a self-incriminatory scheme for narcotics control (Arg. IIB).

presumption violates a defendant's right to trial by jury pursuant to Article III, section 2, and the Sixth Amendment to the Constitution. (Arg. IC)

In addition, the requirement of 26 U.S.C. § 4704a that no narcotic drug be purchased, sold, dispensed or distributed except in the original stamped package, individually and as part of an overall statutory scheme, is a blatant device to suppress petitioner's right to be free from self-incrimination. It operates at trial to force the defendant to offer testimony to rebut the inference of violation, arising from the statutory presumption therein (Arg. IIA), and, in its terms, it also effects disclosure for the purpose of compelling registration and payment of an occupational tax, in further violation of petitioner's right to be free of self-incrimination (Arg. IIB).[3]

I.

CONVICTION UPON THE STATUTORY PRESUMPTION IN 21 U.S.C. s 174 VIOLATES CONSTITUTIONAL PROTECTION OF DUE PROCESS OF LAW, THE DEFENDANT'S PRIVILEGE AGAINST SELF-INCRIMINATION, AND TRIAL BY JURY.

Petitioner Turner was convicted for facilitating the concealment of narcotic drugs unlawfully imported into the United States, known to have been unlawfully imported, pursuant to 21 U.S.C. § 174. With respect to the key elements of the offense—unlawful importation and knowledge of unlawful importation—no evidence whatsoever was introduced by the prosecution. 404 F.2d 782, 783 (1968). Conviction rested solely on the presumption, embodied in the judge's instructions to the jury which was drawn from the second paragraph of the statute—

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[3] Additional considerations pertinent to Burgess' appeal to the Court of Appeals concern the self-incriminatory effect of 26 U.S.C. § 4705a, individually and as a part of an overall statutory scheme, pointed out in the brief of the petitioner in No. 189.

> "Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

The Supreme Court has recently held unconstitutional a "virtually identical" presumption applied to another narcotic drug (marihuana). *Leary v. United States*, 395 U.S. 6, 44 (1969). The decision in *Leary* held that the statutory presumption, insofar as it displaced requirement for proof that the defendant knew the drug to have been unlawfully imported, violated due process of law, while also raising, though finding no need to dispose of, the possibility that the presumption further violated due process with respect to the requirement for proof of unlawful importation.

Applying the same measure to *Turner*, the presumption violated due process under the Fifth Amendment. Moreover, by coercing the petitioner to testify and thus expose himself to further prosecutions, to explain "possession to the satisfaction of the jury", the presumption violated the petitioner's right to be free at trial from self-incrimination under the Fifth Amendment. Finally, by excising the core of the statutory offense from the prosecution's responsibility for proof, the presumption operated to deny the petitioner his right to trial by jury, guaranteed by Article III and the Sixth Amendment to the Constitution.

A. The Statutory Presumption Violates Due Process of Law

The statutory presumption of 21 U.S.C. § 174, for many years protected from due process challenge by the holding of *Yee Hem v. United States*, 268 U.S. 178 (1925), that the presumption is reasonable applied to smoking opium, has recently been fundamentally shaken by the Supreme Court's decision in *Leary*, *supra*, regarding the "virtually identical" presumption applied to marihuana in 21 U.S.C. § 176a. The

Court was careful to reserve the final downfall of *Yee Hem* for a later case, stating that "we intimate no opinion whatever about the continued validity of the presumption relating to 'hard' narcotics", 395 U.S. at 45, fn. 92, but it pointed to a fatal flaw in the reasoning of *Yee Hem*—the failure to consider that "it is incumbent upon the prosecution to demonstrate that the inference [of statutory violation] is permissible before the burden of coming forward could be placed upon the defendant", 395 U.S. at 45, according to the holding of the Supreme Court in *Tot v. United States*, 319 U.S. 463, 469.

The teaching of *Tot* was controlling in *Leary's* invalidation of the statutory presumption relating to marihuana, and was quoted with favor at 395 U.S. at 33-34—

> "Under our decisions a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. This is not to say that a valid presumption may not be created upon a view of relation broader than a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts." 319 U.S. at 467-68.

See also *United States v. Gainey*, 380 U.S. 63 (1965), and *United States v. Romano*, 382 U.S. 136 (1965). Where *Yee Hem's* finding of reasonableness in the legislative design of Section 174 was premised on its view that the person who obtains an "outlawed commodity" may reasonably be required to rebut at his peril "the natural inference of unlawful importation or your knowledge of it. . ." 268 U.S. at 184, *Leary* "refus[ed] to follow this aspect of the reasoning in *Yee Hem*" 395 U.S. at 45-46, fn. 92, and flatly endorsed the view expressed in *Tot* that the prosecu-

tion must demonstrate the inference is rationally permissible before the presumption may be applied.

The prosecution in this case has fallen into the same pitfalls with respect to "hard" narcotics that defeated the Government's case in *Leary*. The presumption was essential to conviction because no evidence was introduced to show that the drug petitioner is alleged to have sold was unlawfully imported and that the petitioner knew it to have been unlawfully imported–central elements of the charge.[4] Under *Leary's* restatement of the applicable measure of constitutionality, the Government should have introduced evidence "to demonstrate that the inference was permissible before the burden of coming forward"–the burden of satisfactorily explaining possession–"could be placed upon the defendant". 395 U.S. at 45.

Without such a showing to substantiate the inferences of unlawful importation and knowledge thereof, it was error to allow the case to go to the jury on the presumption, and the conviction cannot be sustained on appeal. Moreover, there are compelling indications that the reasonableness of both inferences cannot meet the "rational connection" test restated in *Leary*–

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[4] In *Turner* the judge charged the jury as follows:

> "Now obviously there is no evidence in this case that this particular defendant knew that this cocaine and this heroin had been imported in the United States contrary to law. The statute recognizing the impossibility of proving knowledge in these cases, and having in mind the welfare of the people which is the purpose of the Food and Drug Act, says that all you have to do, all the Government has to do, is to show that there was possession of this drug by the defendant on trial and that evidence shall suffice to authorize conviction of a violation of the statute unless by the witnesses presented the possession of the drugs by this defendant under those circumstances was satisfactorily explained to the jury. I charge you that there is no such evidence as that called for by the portion of the section which I have just completed reading." (Tr. 15-16)

> "The upshot of *Tot*, *Gainey* and *Romano* is, we think, that a criminal statutory presumption must be regarded as 'irrational' or 'arbitrary', and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." 395 U.S. at 36.

Can it be said "with substantial assurance" that unlawful importation and petitioner's knowledge of unlawful importation flow from his mere possession of a narcotic drug?

With respect to *unlawful importation* of the drugs in the petitioner's possession, a number of very real alternatives are available to vitiate "substantial assurance" of unlawful importation. Although it is clearly unlawful to import or bring any narcotic drug into the United States except such amount of crude opium coca leaves as the Commissioner of Narcotics is authorized to prescribe by regulation, and no crude opium may be imported or brought in for the purpose of manufacturing heroin (21 U.S.C. § 173), this statutory bar by no means blocks all the possible alternative origins of the drugs in the petitioner's possession. Other alternative origins of heroin, for example, each of which represents a reasonable (if not inevitable) source, include:

1. *Lawful Importation of Heroin.* As the Court of Appeals for the Ninth Circuit said in *Hernandez v. United States*, 300 F.2d 114 (1962):

> "[I]t cannot be said that all heroin now outstanding in this country is in fact illegally imported since Congress in 1960 enacted a statute providing: 'Notwithstanding the provisions of . . . any other law, the Secretary [of the Treasury] . . . may in his discretion authorize the importation of any narcotic drug . . . for delivery to officials of the United Nations, of the Government of the United States, or of any of the several States, or to any person licensed or qualified to be licensed under section 8 of this Act, for scientific purposes only.' Act of April 22, 1960, § 16, 74 Stat. at page 67 (21 U.S.C. § 513).

See S. Rep. No. 1077, 86th Cong., 2d Sess., 2 U.S. Cong. & Ad. News 1960, at page 1887." 300 F.2d at 119, fn. 11.

See also 21 C.F.R. § 306.3, which lays down discretionary authority under which the Director, Bureau of Narcotics and Dangerous Drugs, may make heroin domestically available. According to the strict construction appropriate for such a penal statute, it would not follow that the drugs in petitioner's possession were unlawfully imported, even assuming the petitioner had come by such drugs without an appropriate scientific-purposes-only license.

2. *Lawful Importation of Source Material, Subsequent Deviation and Manufacture into Heroin.* Although no crude opium may be imported for the purpose of manufacturing heroin, deviation after lawful importation would not necessarily violate the import control statute. For example, in the year 1967, according to the U.S. Treasury, Bureau of Narcotics, there were 2,181 thefts of narcotic drugs totaling 145.89 kg. in weight, a new record quantity. U.S. Bureau of Narcotics, *Report on the Traffic in Opium and Other Dangerous Drugs* (1967), p. 22. The same report lists a considerable volume of lawful domestic processing of convertible opium derivatives, 3,713 kg. of medicinal opium and 715 kg. of morphine (1966 figures), *id.* at 41. The final step in the process, manufacture of heroin from opium or morphine, is a simple and well-known chemical process–

> "Raw morphine can be refined and converted into almost pure heroin (90 to 97 per cent) with relatively simple means and material with the help of products the sale of which is uncontrolled, and without the need for any special adaptation of the premises used; in this way many kilos can be produced weekly.
>
> "A bathroom or kitchen fitted with town gas or butane gas or with electricity is sufficient for the purpose." See C. Vaille and E. Bailleul, "Clandestine Heroin Laboratories," in *Bulletin of Narcotics* (United Nations), Vol. V, no. 4, Oct.-Dec. 1953, p. 1.

That these processes are not unknown to heroin dealers in the United States–and to the Bureau of Narcotics as well[5]–is reflected in the candid official U.S. report of a particular seizure of five ounces of high-grade heroin "believed to have come from a clandestine laboratory." *Report on Traffic in Opium and Other Dangerous Drugs* (1946), p. 19. See also *Report on Traffic in Opium and Other Dangerous Drugs* (1954), p. 4.

3. *Domestic Production of Opium and Manufacture into Heroin.* Though official statistics of domestic growth of the opium poppy do not appear to be currently reported, the amenability of the plant to cultivation has long been recognized and was a prime target of Congressional enactment of the taxing provisions of the Harrison Narcotics Act of 1914 (26 U.S.C. § 4701). Justifying that tax, Congressman Harrison said–

> "The act approved Feb. 9, 1909 prohibits the importation of opium except for medicinal purposes, and so makes it illegal for any one to import crude opium into the United States and so manufacture smoking opium. But it is possible for those desiring to do so to cultivate the poppy in several of the states (notably those of the Pacific slope), produce opium therefrom, and under the Act of October 1, 1890, secure a license and manufacture such domestically produced opium into smoking opium for local consumption and interstate traffic. Owing to the high price which smoking opium now commands as the result of its legal exclusion from the U.S. certain persons have declared their intention of producing opium in the U.S. and manufacturing it into smoking opium. Should this intention be carried out it would be a direct defeat of the chief object of the Act. . ., and may be checked by so amending

[5]Note that the prospect of domestic manufacture is also recognized within the regulatory scheme of 48 states and the District of Columbia as expressed in § 2 of the Uniform Narcotic Drug Act. See 9B Uniform Laws Ann. 409-410 (1966).

> the Act of October 1, 1890 as to impose a prohibitive internal revenue tax on all smoking opium manufactured in the United States from domestic crude opium. . ." H. Rep. 22, 63d Cong., 1st Sess., 1913, p. 1-2.

Moreover, to provide further teeth to controls over domestic production, Congress enacted the Opium Poppy Control Act of 1942, 21 U.S.C. §§ 188 *et seq.* providing a comprehensive licensing scheme for domestic production of the opium poppy. For indication that evil Congress intended to curb has nonetheless continued, note the misfortunes of the defendant in *Az Din v. United States*, 232 F.2d 283 (C.A. 9), *cert. denied*, 352 U.S. 827 (1956). See also *Stutz v. Bureau of Narcotics*, 56 F. Supp. 810 (N.D. Cal., 1944).

Thus, derived from either licensed or unlicensed domestic growth, the possibility of 100% domestic production is not to be discounted.

4. *Domestic Synthesis of Heroin.* For an ingenious, but no less relevant, example of an effort to synthesize morphine and cull opium from unregulated substances, see *Liss v. United States*, 137 F.2d 996, *cert. denied*, 320 U.S. 773 (1943).

All of the foregoing represent illustrative ways in which heroin may have entered petitioner's possession other than by unlawful importation. Together they cumulate to vitiate the "substantial assurance" which *Leary* requires must underly the inference of unlawful importation from mere possession. It may be that a careful study of the probabilities would substantiate the validity of the presumption in fact, but this record provides absolutely no basis for such an inference, which, as *Leary* teaches, cannot therefore be sustained.

Moreover, upon such showing of the unsubstantial basis for the presumption of unlawful importation, *Leary* dictates that the presumption of *knowledge* must also fall, unless the Court can be persuaded that

> "a majority of [heroin] possessors either are cognizant of the apparently high rate of importation or otherwise have become aware that *their* [heroin] was grown abroad." 395 U.S. at 42.

Without any indication of the petitioner's knowledge, and without any profile of the knowledge of the nation's heroin-possessing population, *Leary* holds that the presumption "cannot be upheld without making serious incisions into the teachings of *Tot*, *Gainey* and *Romano*" 395 U.S. at 52. Nor, consequently, can this court "escape the duty of setting aside petitioner's conviction" 395 U.S. at 53, in this case as in *Leary*.

B. The Statutory Presumption Violates the Fifth Amendment Privilege Against Self-Incrimination.

Petitioner Turner offered no evidence (Tr. 15-16, *supra*), as prescribed in *Yee Hem* to "rebut . . . the natural inference of unlawful importation, or [his] knowledge of it." 268 U.S. at 184. The result was predictable conviction since possession was not explained to the "satisfaction" of the jury and the jury was instructed that it may convict on possession and nothing more. (Tr. 15-16, *supra*) That result, which penalizes the silence of the defendant, violates the constitutional protection against self-incrimination both with respect to this charge against him[6] and any other charge which might have been brought upon the basis of the acknowledgment of possession which he would have had to make to rebut the inferences of knowledge and unlawful importation.

With respect to the operation of the presumption to incriminate the petitioner in this case, Mr. Justice Black

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[6]The same issue—the jeopardy to the defendant's constitutional rights to remain silent in capital trials arising from the "single-verdict procedure", where a jury determines both guilt and sentence—is currently presented for determination by the Supreme Court in the "capital punishment case" *Maxwell v. Bishop*, No. 13, Oct. Term 1969.

denounced similar inferences of ownership and proprietorship from mere presence at a still, in *Gainey*, *supra*. He said, in terms directly applicable here,

> "These statutory presumptions must tend, when incorporated into an instruction, as they were here, to influence the jury to reach an inference which the trier of fact might not otherwise have thought justified, to push some jurors to convict who might not otherwise have done so. *Cf.* Pollock v. Williams, 332 U.S. 4, 15, 88 L.ed. 1095, 1102, 64 S.Ct. 792. The undoubted practical effect of letting guilt rest on unexplained presence alone is to force a defendant to come forward and testify, however much he may think doing so may jeopardize his chances of acquittal, since if he does not he almost certainly destroys those chances. This is compulsion, which I think runs counter to the Fifth Amendment's purpose to forbid convictions on compelled testimony. I am aware that this Court in *Yee Hem v. United States* . . . [*supra*] held that use of a presumptive squeeze like this one did not amount to a form of compulsion forbidden by the Fifth Amendment. The Court's reasoning was contained in a single paragraph, the central argument of which was that despite a presumption like this a defendant is left 'entirely free to testify or not as he chooses.' That argument, it seems to me, would also justify admitting in evidence a confession extorted by a policeman's pointing a gun at the head of an accused, on the theory that the man being threatened was entirely free to confess or not, as he chose. I think the holding in *Yee Hem* is completely out of harmony with the Fifth Amendment's prohibition against compulsory self-incrimination, and I would overrule it. . ." 380 U.S. at 87-88 (dissenting opinion).

Recognition by a majority of the court of the same principle has recently been strongly expressed in *Griffin v. California*, 380 U.S. 609 (1965), where comment by the prosecution on the defendant's silence was held violative of his self-incrimination protection, because the rule permitting

such comment "is a penalty imposed by courts for exercising a constitutional privilege," a penalty which "cuts down on the privilege by making its assertion costly." 380 U.S. at 614. Similarly, the Court voided the portion of the Federal Kidnapping Act, 18 U.S.C. § 1201a, providing the death penalty if the jury so recommended, in *United States v. Jackson*, 390 U.S. 570 (1968), which worked to discourage "assertion of the Fifth Amendment right not to plead guilty," and thereby to "chill the assertion of constitutional rights by penalizing those who choose to exercise them. . ." 390 U.S. at 581.

The privilege against compulsory self-incrimination is "as broad as the mischief against which it seeks to guard." *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892), and ". . . the privilege is fulfilled only when the person is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will." *Malloy v. Hogan*, 378 U.S. 1, 8 (1964); *Miranda v. Arizona*, 384 U.S. 436 (1966). By these standards, the instant presumption ineluctably works to penalize the defendant for his silence. Moreover, the attempt at even-handedness shown by the trial judge in instructing the jury that the statutory presumption does not shift the burdens of proof (Tr. 16) is no less "subtly compelling" judicial condemnation when coupled with an awesome instruction that "some particular factual inference has been enshrined in an Act of Congress," as Mr. Justice Douglas indicated in his dissent in *Gainey*, 380 U.S. at 72-73. Under such a charge, Mr. Justice Black pointed out, "Few jurors could have failed to believe it was their duty to convict. . ." *Id.* at 77. In principle and in practical effect, the "presumptive squeeze" of the statute violated the petitioner's Fifth Amendment right to be free from self-incrimination.

Moreover, it should also be pointed out that the reach of testimonial compulsion goes beyond potential conviction in this case, to prosecution for failure to register and pay the Federal occupational tax required of all possessors of narcotic drugs, 26 U.S.C. §§ 4724a, c, and possession itself under

local law, *e.g.*, 24 N.J.S.A. § 18-4. For petitioner Turner to overcome the presumption in a prosecution under 21 U.S.C. § 174 with respect to unlawful importation and knowledge thereof, he must acknowledge possession of a narcotic drug. Even if successful in the Federal prosecution, he would thereafter be subject to re-charging on the basis of the admissions of possession there made, and acquittal would not protect him from double jeopardy. See, *e.g.*, *Bartkus v. Illinois*, 359 U.S. 121 (1959). Thus the constituional privilege would be further violated.

C. The Statutory Presumption Operates To Deprive the Defendant of Trial by Jury.

In his dissent in *Gainey*, Mr. Justice Black found that the use of statutory presumptions

> "seriously impaired Gainey's constitutional right to have a jury weigh the facts of his case without any congressional interference through predetermination of what evidence would be sufficient to prove the facts necessary to convict in a particular case." 380 U.S. at 81.

Such interference, he found, violated the right to trial by jury guaranteed by Article III, § 2, and the Sixth Amendment of the Constitution, relying on *Bailey v. Alabama*, 219 U.S. 219 (1911), where a state statute was invalidated which provided that failure to provide services contracted and paid for or to refund money would be prima facie evidence of intent to defraud.

The same principle served as grounds for Justice Black's concurrence in *Leary* where he held that Congress cannot tell juries to convict on "any such forced and baseless inference" as the presumption there–and here–involved. 395 U.S. at 55.

Here the vice of depriving the accused of the right to have jury weigh the central elements of the charge brought against him should similarly defeat any conviction premised on inferences as "forced and baseless" as the inferences of

unlawful importation and knowledge thereof have been shown to be.[7]

II.

INDIVIDUALLY AND AS PART OF A BROAD STATUTORY SCHEME, 26 U.S.C. § 4704a COMPELS SELF-INCRIMINATION CONTRARY TO THE FIFTH AMENDMENT.

Both in terms of its operation at trial and as an integral part of a broad statutory narcotics control scheme, 26 U.S.C. § 4704a, as applied to this petitioner, violates the Fifth Amendment's protection against self-incrimination. As such, the conviction of the petitioner must be reversed.

A. Individually, Section 4704a Violates the Petitioner's Right To Remain Silent at the Trial.

The petitioner was prosecuted under 26 U.S.C. § 4704a for having purchased drugs not in or from their original stamped package, as to which mere possession of such drugs without the requisite tax stamps was the only indication of a statutory violation shown by the Government. 404 F.2d at 783. The case went to the jury solely on the statutory presumption of Section 4704a, which provides, as follows–

> ". . . the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found."

[7]The same consideration would also require upsetting Turner's conviction under 26 U.S.C. § 4704a where mere possession is said to be "prima facie" evidence of violation of the subsection. According to the Third Circuit, "The Government offered no evidence . . . that [Turner] did not purchase the drugs in or from their original stamped package." 404 F.2d at 783. In practical terms, therefore, the jury reached its result not on evidence, but on the statutory mandate, in violation of its responsibilities and Turner's rights under the Constitution.

In its practical effect, this presumption operates just as the presumption in 21 U.S.C. § 174, to confront the defendant at trial with the incriminatory dilemma of keeping silent with respect to any explanation he might offer as to how he came by drugs without tax stamps, and making such an explanation that would open up the prospect of further prosecution, under Federal law (*e.g.*, for failing to register and pay the occupational tax as required by 26 U.S.C. §§ 4722-4724) on a mere showing of possession, or under local law for possession itself (*e.g.*, 24 N.J.S.A. § 18-4).

United States v. Gainey, *supra*; *Griffin v. California*, *supra*; and *United States v. Jackson*, *supra*, all dictate, for the reasons set forth in Arg. IB, *supra*, that this further prosecutorial shortcut be condemned under the Fifth Amendment's protection against compulsory self-incrimination.

B. As Part of a Comprehensive Narcotics Control Scheme, 26 U.S.C. § 4704a Violates Petitioner Fifth Amendment Right To Be Free from Self-Incrimination.

The statutory section in question is part of a comprehensive regulatory scheme embodied in the Harrison Act, applying a regime of taxation and disclosure to every critical element in the chain of commerce in these commodities. The principal statutory controls in Title 26, are, in summary, the following:

1. **Commodity tax**–Section 4701a requires a tax to be paid on every narcotic drug, regardless of origin, by the importer, manufacturer, producer or compounder (Section 4701b), with certain exemptions (Section 4702). Evidence of payment of tax is to be in the form of stamps affixed to the container. (Section 4703) Section 4704a makes it unlawful to purchase, sell, dispense or distribute narcotic drugs without the stamps affixed.

2. **Registration and occupational tax**–Section 4721 imposes an annual occupational tax on "every person who imports, manufactures, produces, compounds, sells,

deals in, dispenses, or gives away "narcotic drugs, varying according to category of occupation. Section 4722 requires each person who engages in a business within the coverage of Section 4721 to register annually. Section 4723 bars possession of "any original stamped package containing narcotic drugs by any person who has not registered and paid" the occupational tax. Section 4724 makes unlawful the carrying on of any occupation subject to the occupational tax without paying the tax and, *inter alia*, similarly bars possession by any person who has not registered and paid the occupational tax of any narcotic drug.

3. **Transaction controls**–Section 4705 makes it unlawful to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of a person to whom the Secretary of the Treasury has issued, in blank, an official order form. (Section 4704a) Each person who receives a form must preserve the form for inspection for a period of two years (Section 4704d). Forms shall be sold only to persons registered with the Secretary, whose names are to be entered on the form and recorded in the Secretary's records, and no one else may use such forms. (Section 4705f) Narcotics obtained by use of such forms may be used only in a lawful business or legitimate practice of a profession. (Section 4705g) Inspection of duplicate order forms, retained by the Secretary (Section 4704e) and order forms preserved by transferors is open to Federal and State law enforcement officials (Section 4773).

When seen in context of this overall statutory scheme, it is apparent that the vice of compulsory self-incrimination struck down by the Supreme Court in *Albertson v. SACB*, 382 U.S. 70 (1965), *Marchetti v. United States*, 390 U.S. 39 (1968), *Grosso v. United States*, 390 U.S. 62 (1968), *Haynes v. United States*, 390 U.S. 85 (1968), and *Leary*, 395 U.S. at 12-27, are fully present in the application of 26 U.S.C. § 4704a to the petitioner.

For it is clear that th[e tax stamps are an essential aspect] of the registration and [occupational tax provisions of the] Harrison Act. If petiti[oner Turner himself had imported,] manufactured, produce[d, or compounded the heroin in his] possession, he would ha[ve had to identify himself to Federal] Revenue officials, for t[he purpose of paying the commodity] tax himself (Section 47[01b), and thus forced himself to reg]ister and pay the occ[upational tax pursuant to Sections] 4721 and 4722. Had h[e acquired the heroin from the com]modity taxpayer, the tr[ansfer could only have been lawfully] accomplished pursuant [to a written order form which the] petitioner would have [had to secure pursuant to Section] 4705a, a requirement b[roadly condemned in *Leary*, *supra*,] and which would mor[eover have made petitioner directly] liable to register and p[ay the occupational tax, 26 U.S.C.] § 4705b. Indeed, mere[possession of narcotics in stamped] packages would have be[en sufficient to invoke a requirement] pursuant to Section 47[23 that the petitioner pay the occu]pational tax and registe[r.

Section 4704a under [which petitioner was tried and con]victed is, hence, nothin[g more than a satellite device for the] registration and occupat[tional tax provisions. In the light of] petitioner's exposure to [prosecution for possession of a nar]cotic drug under appli[cable state law, 24 N.J.S.A. § 18-4,] petitioner's conviction [under 26 U.S.C. § 4704a is indistin]guishable from the cor[nviction in *Haynes v. United States*,] *supra*, where the Supre[eme Court invalidated a conviction] under the similarly int[errelated provisions of the National] Firearms Act. In *Hayn[es* the Court held that a statute that] makes unlawful posses[sion of an unregistered firearm, 26] U.S.C. § 5851, is not pr[operly distinguishable from a statute] which requires registra[tion of possession of a firearm, 26] U.S.C. § 5341, and that [the registration of possession would] expose the registrant to [prosecution under state law. 390] U.S. at 90-95.

Nor is the statutory e[ffort in *Haynes* to punish for failure] to register a contraband [commodity properly distinguishable] from the effort in *Turn[er* to punish the petitioner because

he has not publicized his possession of the contraband drug by payment of the commodity tax. Both statutes are an equally thin mask for a Federal individual registration provision, a provision that the Congressional sponsors of the Harrison Act conceived in 1913 as a device to meet the

> "real, even desperate, need of Federal legislation to control our foreign and interstate traffic in habit-forming drugs, and *to aid both directly and indirectly the States more effectually to enforce their police laws.*" H. Rep. 23, 63d Cong., 1st Sess., p. 1 (emphasis added).

Haynes dictates that any effort to effectuate this purpose by punishment for declining to incriminate oneself cannot be countenanced under the Fifth Amendment.

CONCLUSION

For the foregoing reasons, the amicus curiae urges that the conviction of petitioner Turner be reversed.

Respectfully submitted,

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(Appointed by the United States Court of Appeals for the District of Columbia Circuit)

August 15, 1969

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief for the Amicus Curiae, Cleveland Burgess, have been served in hand this 15th day of August 1969 upon the Office of the Solicitor General, U. S. Department of Justice, and the United States Attorney for the District of Columbia, U. S. Courthouse, Washington, D. C., and by mail, postage prepaid, upon counsel for petitioner, Josiah E. DuBois, Jr., 511 Cooper Street, Camden, N. J. 08101.

Steven R. Rivkin